INDEX

410-752—70——1

CITATIONS

Cases:

Cases—Continued:

Constitution and statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 133

UNITED STATES OF AMERICA, APPELLANT

v.

THIRTY-SEVEN (37) PHOTOGRAPHS, MILTON LUROS, CLAIMANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge District Court for the Central District of California (App. 24–27) is reported at 309 F. Supp. 36.

JURISDICTION

On January 27, 1970, a three-judge District Court in the Central District of California, convened pursuant to 28 U.S.C. 2282, entered a judgment permanently restraining the United States and its agents from enforcing against appellee the provisions of 19 U.S.C. 1305(a) (the customs obscenity statute) and declaring that the statute, on its face and as applied

in this case, violated the claimant's rights under the First and Fifth Amendments to the Constitution (App. 28). A notice of appeal to this Court was filed in the district court on February 26, 1970 (App. 29). Probable jurisdiction was noted on October 12, 1970 (App. 30). The jurisdiction of this Court rests on 28 U.S.C. 1253. See, *e.g.*, *Zemel* v. *Rusk*, 381 U.S. 1, 5–7; *Flast* v. *Cohen*, 392 U.S. 83, 90–91.

QUESTIONS PRESENTED

1. Whether the United States may validly prohibit the importation of obscene matter for subsequent commercial distribution.

2. Whether a person importing obscene matter for commercial distribution has standing to challenge a statute also prohibiting the importation of such matter for private use and, if so, whether the statute is valid.

3. Whether the statute prohibiting the importation of obscene matter into the United States, 19 U.S.C. 1305(a), provides adequate administrative and judicial safeguards.

STATUTE INVOLVED

19 U.S.C. 1305(a) provides in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles wheth-

er imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * * *Provided, further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or

matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

The pertinent facts were stipulated in the district court (App. 15–16). They show that claimant Luros returned to this country from Europe by airplane on October 24, 1969, arriving at Los Angeles. During the customs inspection, customs agents seized from his luggage the thirty-seven photographs involved herein,[1] a book entitled *Forbidden Erotica,* a book album of the works of one Peter Fende, and a "girlie" magazine. It was stipulated that (App. 16):

> Some or all of the 37 photographs seized were intended to be incorporated in a hard cover edition of the *Kama Sutra of Vatsyayana,* which book describes candidly a large number of sexual positions. The book has been distributed widely throughout the Nation and has been acclaimed as a work of substantial value. At the time of the seizure of the 37 photographs, the claimant, Milton Luros, advised the Customs Inspector that at least some of the photographs were intended for inclusion in the book *The Kama Sutra.* * * *

[1] These photographs have been lodged with the Clerk of this Court.

On October 31, 1969, the District Director of the Bureau of Customs wrote Luros, advising him that the matter had been referred to the United States Attorney for forfeiture action. On November 4, 1969, Luros' attorney wrote the District Director demanding the return of the seized material. The following day, the United States Attorney's Office returned all the material seized except for the thirty-seven photographs. On November 6, 1969, the United States commenced the present action under 19 U.S.C. 1305(a) for forfeiture of the photographs as obscene (App. 2). Luros filed an answer and counterclaim on November 14, 1969, contending that the photographs were not obscene and that 19 U.S.C. 1305(a) was unconstitutional (*ibid.*). He moved to convene a three-judge district court under 28 U.S.C. 2282 to resolve these issues (App. 9). The motion was heard on November 18, 1969, and an order to convene a three-judge court was issued on November 20, 1969 (App. 12–13). The hearing before the three-judge court was held on January 9, 1970 (App. 14–15).

The court issued its opinion on January 27, 1970. Tacitly assuming that the pictures seized here are obscene, the court nonetheless ruled that the statute is unconstitutional on its face and as applied (App. 24–27). The court noted that the statute reaches "all obscene works" and "prohibits an adult from importing an obscene book or picture for private reading or viewing" (App. 25). It therefore concluded that the statute is invalid on its face under this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557 (*ibid*).

410-752—70——2

Despite the fact that the claimant stipulated that he had imported the pictures for commercial, not private, use, the court held that he had standing to attack the statute on the basis of its application to importation for private use (App. 25). Relying upon *Freedman* v. *Maryland,* 380 U.S. 51, the court also ruled that the statute violated the due process clause because it fails to guarantee that any restraint on allegedly obscene material will be imposed for only "a specified brief period" prior to the judicial resolution of the issue of obscenity (App. 26).

SUMMARY OF ARGUMENT

This case involves the constitutional validity of the federal government's prohibition on importation of obscene material and the procedural arrangements for administrative and judicial decision of the issue whether an item which has been seized at customs is obscene.

The court below interpreted this Court's decision in *Stanley* v. *Georgia,* 394 U.S. 557, as establishing a right to obtain obscene matter for personal use. Appellee's importation admittedly was for commercial use. But because the statute at issue, 19 U.S.C. 1305(a), prohibits importation of obscene matter, irrespective of its intended use, the court held that it was invalid on its face. The court alternatively ruled, in reliance upon *Freedman* v. *Maryland,* 380 U.S. 51, that the seizure-forfeiture procedure under the statute violated due process because it lacked legislatively prescribed maximum time periods during which the government was

required to take administrative steps and ultimately seek judicial resolution of the issue of obscenity.

I

Our primary contention is that the established power of the government to control importation of goods into the United States, under which obscene matter has long been excluded, was in no way impaired by this Court's decision in *Stanley* v. *Georgia, supra.* That decision held that the State could not punish an individual for possession of obscene matter in the privacy of his dwelling. It rested upon the right of the individual to be free from government intrusion into his home and private thoughts. This protection of the individual does not, however, extend to the material itself. The *Stanley* opinion expressly disclaimed overruling or limitation of *Roth* v. *United States,* 354 U.S. 476, which had upheld government prohibition of the public distribution of obscene matter because such matter was not protected by the First Amendment. Since the obscene material is not protected, the right not to be punished for possessing it in one's home does not carry with it a right to obtain or to distribute it commercially.

The protection of the individual upon which *Stanley* was based, moreover, does not apply to prevent seizure of obscene matter at customs, even if the individual claims it is intended for personal use. The respective interests of the government and the individual are different at customs than when the government seeks to intrude into the privacy of the home. One's belongings traditionally are subject to close examination

at customs in order that the government effectively can control importation of goods into the country. Forfeiture proceedings are *in rem* against the obscene matter; no fine or criminal penalty is imposed on the individual. And the degree of assurance that material seized at customs is intended only for private use is less than it is with respect to matter which is discovered only by invasion of an individual's home.

II

Even if *Stanley* requires the government to refrain from interfering with the importation of obscene material for private use, it does not forbid prohibiting importation for commercial purposes. The court below apparently assumed as much. This being so, however, that court should have upheld the statute as applied to appellee, who admittedly was an importer for commercial purposes. Congress intended such an approach in the event the statute was held unconstitutional as applied to some cases, for it included a separability provision in the statutory scheme.

Appellee did not, in fact, have standing to assert the unconstitutionality of the statute as applied to private importers. Although this Court has allowed parties standing to challenge certain statutes affecting First Amendment rights on their face when their own activity could, in any event, be constitutionally prohibited, it has done so only when the statutes are vague, as well as overly broad. But the statute here is certainly not vague. The categories of personal and commercial use may be readily distinguished so that there will be no uncertainty as to the reach of the statute

if it is held valid only when applied to commercial importation.

III

The procedural safeguards which are necessary under *Freedman* v. *Maryland, supra,* exist under Section 1305(a) notwithstanding the fact that rigid time limits have not been set upon the forfeiture proceedings. The statute insures the government will obtain a prompt judicial determination as to whether material it seizes and wishes to destroy is obscene. The statute requires the collector of customs to report seizures to the district attorney who, in turn, must institute forfeiture proceedings forthwith. Judicial interpretation, as well as the legislative history of the statute, has made it plain that all the steps in the forfeiture process must be taken as rapidly as is possible consistent with responsible adjudication on the issue of obscenity. Decisions upholding the procedure of the statute on its face provide sufficient indication of acceptable time periods. The time between seizure and court decision in this case—three months, a part of which was due to the convening of a three-judge court—is wholly consonant with the approach of those decisions and the due process requirements of *Freedman.*

ARGUMENT

I. THE POWER OF THE UNITED STATES TO PROHIBIT THE IMPORTATION OF OBSCENE MATTER WAS NOT IMPAIRED BY THIS COURT'S DECISION IN *STANLEY* v. *GEORGIA*

Article I, Section 8 of the Constitution grants Congress the power to "regulate commerce with foreign Nations." The only limitations on this power are those

contained in other provisions of the Constitution. Among other things, it includes the power to "exclude merchandise at discretion." *Board of Trustees* v. *United States,* 289 U.S. 48, 56–57; *Brolan* v. *United States,* 236 U.S. 216, 218–219; *Weber* v. *Freed,* 239 U.S. 325, 329; see also *Minor* v. *United States,* 396 U.S. 87, 98, n. 13. Under this power, Congress has prohibited importation of various types of obscene material into this country since 1842. See 5 Stat. 566.[2] This Court has long recognized that such material is, in effect, "merchandise"—unprotected by the First Amendment and fully subject to the government's power to exclude. *E.g., Roth* v. *United States,* 354 U.S. 476, 481; *Ginzburg* v. *United States,* 383 U.S. 463, 474–475.

A. The court below is one of a number which recently have interpreted this Court's decision in *Stanley* v. *Georgia,* 394 U.S. 557, as impairing those principles—despite the *Stanley* opinion's express statement that the *Roth* holding was "not impaired." 394 U.S. at 568. See, *e.g., Byrne* v. *Karalexis,* No. 83, this Term; *United States* v. *Reidel,* No. 534, this Term; *United States* v. *Various Articles of "Obscene" Merchandise,* No. 706, this Term. In the government's brief *amicus curiae* in *Byrne, supra,* we undertake to show how that failure to honor the explicit reservation in *Stanley*—made not just once, but in several passages in the opinion, 394 U.S. at 563, 567, 568—arises out of a failure to recognize the opinion's focus

[2] A brief history of federal obscenity legislation is detailed in the government's brief in the *Roth* case (No. 582, O.T., 1956), pp. 79–81.

on the privacy of the individual whose possession of obscene matter was there made a crime.

Here, we stress another facet of that decision, expanding upon our analysis in *Byrne*. In referring to First Amendment rights, the *Stanley* opinion is careful to refer to those rights as associated with Mr. Stanley, the individual accused of crime, and *not* as the product of any First Amendment status inhering in the materials themselves. It was Mr. Stanley who was to be protected, not the materials he possessed; and the right enunciated was to be free of state inquiry into the contents of his library—an inquiry which, under the circumstances of that case, could have no other purpose than supervision of the morality of his own, individual thoughts. If the materials are not protected, there is no "right to receive" them as such; and protection of the individual's right from inquiry into his private thoughts in no way implies that the community must tolerate public distribution and availability of materials which, in themselves, the First Amendment does not protect. The fact which distinguishes *Stanley* from all the pending cases is that there the community did not know, and had no right to know, independent of an asserted interest in Mr. Stanley's personal morals and thoughts, what it was that he possessed.

In *Stanley,* state agents entered appellant's home under a search warrant which authorized them to seize evidence of bookmaking. In the course of the search, entirely by accident and without suspecting what they would find, they discovered a roll of motion picture film and a projector. They viewed the film, concluded

it was obscene, and arrested appellant. He was convicted under state law for "knowingly hav[ing] possession of * * * obscene matter." See 394 U.S. at 558–559. Proceeding on the assumption that the film was obscene under "any of the tests advanced by members of this Court" (394 U.S. at 559, n. 2), this Court nonetheless reversed the conviction.

The express and limited holding of the majority was that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" (*id.* at 568). The court below, however, apparently viewed the statement in *Stanley* that the "Constitution protects the right to receive information and ideas * * * regardless of their social worth," 394 U.S. at 564, as the operative rationale of the decision. It concluded from this that the statute could not constitutionally deprive "a person who may constitutionally view pictures of the right to receive them" (App. 25).

This interpretation misconceives the basis of the *Stanley* decision. The "right to receive" of which this Court spoke could not have been intended to encompass a right to receive obscenity, a class of material which *Stanley* itself recognized as outside the scope of First Amendment protection. See *Roth* v. *United States, supra;* cf. *Valentine* v. *Chrestensen,* 316 U.S. 52. Recognition of such a right would emasculate *Roth's* holding that the government does have power to regulate the public distribution of obscene matter (354 U.S. at 491–492), something that the Court was careful to disclaim. The decision in *Stanley* rested essentially on the right of the indi-

vidual to be free from interference by government with the privacy of his home and the "moral content of * * * [his] thoughts." 394 U.S. at 565. Thus, the Court asserted that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Ibid.*

The lack of authority to punish an individual for possession of obscene materials in his home does not correlatively invest the material itself with First Amendment protection it otherwise does not enjoy. And the protection of privacy does not require recognition of a right to obtain or dispense obscene material. The claim of a "right to receive" obscene matter, as one commentator has stated:

> misconceives the reasons for which, according to *Stanley*, society stays its hand in the case of private indulgence. It does not acknowledge a "right" to undergo pornographic experiences in private any more than the statute of frauds grants a "right" to breach oral contracts. The law tolerates both because of uniquely remedial considerations. The cure would be worse than the disease. The recognition of this does not mean that society either values the disease or considers it with indifference. Should the repellant activity surface in circumstances not relevant to privacy the law will step in. The privilege recognized in *Stanley* is, in short, a shield for the private citizen, not a sword for the purveyor. [Gegan, *The Twilight of Nonspeech*, 15 Catholic Lawyer 210, 218–219 (1969).]

The power of government to prohibit distribution and possession of unprotected obscene matter is thus impaired by *Stanley* only to the extent that it is enforced by an improper invasion of the right of the individual "to be let alone—the most comprehensive of rights and the right most valued by civilized men" *Olmstead* v. *United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting); see 394 U.S. at 564. *Stanley* is an application of the principle that

> The secular state is not an examiner of consciences: it must operate in the realm of behavior, of overt actions, and where it does so operate, not only the underlying, moral purpose of its operations, but also the *choice of means* becomes relevant to any Constitutional judgment on what is done. * * * [*Poe* v. *Ullman,* 367 U.S. 497, 547 (Harlan, J., dissenting).]

That principle was endorsed by the Court in *Griswold* v. *Connecticut,* 381 U.S. 479.[28]

B. Viewing *Stanley* thus, it might nonetheless be contended that customs inspection is one of the places where the "right to be let alone" as to written materials must be honored, at least so far as those materials are said to be meant for private use once imported. Of course, the materials here are avowedly for public, commercial use, and we shall show why an

[28] It is interesting to note that the issue decided in *Stanley* was the principal one raised, on virtually identical facts, in *Mapp* v. *Ohio,* 367 U.S. 643, 673 (Harlan, J., dissenting). The Court did not reach that issue in *Mapp,* reversing the conviction solely on Fourth Amendment grounds. The same term, the Court also refrained from deciding the comparable issue concerning punishment for use by married couples in the privacy of their own homes of contraceptive devices. *Poe* v. *Ullman, supra.* The issue was, of course, subsequently decided in *Griswold* v. *Connecticut, supra,* which we believe is a critical foundation of the *Stanley* decision.

importer for such purposes may not avail himself of any private right to import. But we further contend, for several reasons, that the *Stanley* rationale does not extend to importation even for avowedly personal use.[3]

First, there is no "right to be let alone" in a customs search at the nation's borders, which is very different from a police search through a private library. An individual's luggage, as well as his person, has traditionally been subject to examination by governmental authorities at customs without probable cause or a search warrant; this is permitted by statutes going back more than a hundred years. 19 U.S.C. 482, 1582. *Carroll* v. *United States,* 267 U.S. 132, 150–154; *Boyd* v. *United States,* 116 U.S. 616, 623–624; *Alexander* v. *United States,* 362 F. 2d 379, 382 (C.A. 9), certiorari denied, 385 U.S. 977. Cf. *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, 76. Such searches are necessary unless the government's legitimate objective of preventing smuggling is to be severely impaired. Because of this paramount governmental interest, property which in other circumstances is afforded greater protection is not protected by the right of privacy at the border. Books and papers may be examined if for no other reason than to see what may be concealed between their leaves.

Second, the customs procedures here are procedures *in rem*—strictly against the materials (which *Stanley* does not protect) and not against the individual seek-

[3] The question need not be reached in this case; but if not reached, we note that it is pending in two other cases now before the Court at the jurisdictional stage: *United States* v. *Various Articles of "Obscene" Merchandise, supra; United States* v. *12 200-ft. Reels of Super 8 mm. Film,* No. 364, this Term.

ing to import them. Mr. Stanley was accused of a crime, for which he might have been punished by a fine or sentence. Here, no crime is charged; the entire issue is whether certain merchandise, which by hypothesis has no saving content of ideas or other merit, must be admitted into the country. The power of Congress to exclude any matter from entry, save as it may be protected by the Constitution, is complete. It is not a question of attempting to regulate private morals or thought by criminal sanction; Congress is exercising its undoubted power to exclude what it deems noxious to the nation as a whole and which, in itself, can claim no First Amendment protection. See *Roth, supra,* 354 U.S. at 485; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571–572.

Finally, there is a rational basis for Congress to conclude that public morality—not simply an individual's private thought—is threatened even by importations avowedly for personal use. When, as in *Stanley,* material is found by accident hidden in a desk in a private home, one may have considerable confidence that it is meant only for private use. At the country's borders, before it has reached its ultimate destination, no such confidence is possible. Save in the case of bulk shipments or matter inherently commercial, such as 35 mm. motion picture film, noncommercial importations are not self-identifying. Two or three copies of catalogues together with samples, see, *e.g., 12 200-Ft. Reels, etc., supra,* might fuel a sizeable mail-order operation. Once permitted past the customs barrier, they cannot be retrieved no matter how they are

used. The assertion that the materials are intended for private use is easy for an importer to make. To adopt a rule which makes that assertion sufficient, as a matter of constitutional law, to force entry would be to deprive customs officers of necessary flexibility in administering the customs statute.[4]

II. APPELLEE, WHO ADMITTED THAT HE WAS IMPORTING THE MATERIAL HERE FOR SUBSEQUENT COMMERCIAL DISTRIBUTION, LACKS STANDING TO CHALLENGE THE CUSTOMS OBSCENITY STATUTE ON THE GROUND THAT IT ALSO PROHIBITS THE IMPORTATION OF OBSCENE MATTER FOR STRICTLY PRIVATE USE

Even assuming, *arguendo,* that there is a right to import obscene material solely for private use, the government may nonetheless prohibit importation of obscene material, such as that involved in this case, which is intended for commercial distribution. See *United States* v. *Articles of "Obscene" Merchandise,*

[4] As this Court has previously been informed, the government's policy in prosecuting violations of the mail obscenity statute, 18 U.S.C. 1461, is not to prosecute mailings which are consensual, adult, and private in nature. See *Redmond* v. *United States*, 384 U.S. 264. While such a policy might be wise in the customs area, and undoubtedly is followed by individual customs officers, officially there is no such policy at present. Our point here is that, in view of the danger of false statements in the customs process and the limitations on information available to the customs officials regarding actual intended use, there is no constitutional requirement that material be admitted once it is promised that it will be used only privately. The statute itself, in providing for importation of "the so-called classics * * *," twice emphasizes the need for discretion on this issue. While that exception undoubtedly has been deprived of operative impact by the trend of this Court's decision, the emphasis is nonetheless instructive.

315 F. Supp. 191 (S.D. N.Y.), pending on jurisdictional statement, No. 706, this Term. Any other rule would make meaningless the reference to *Roth* in *Stanley*. Indeed, the court below assumed that a customs statute limited to importations for commercial use might be valid; it based its decision on the statute's application also to importations for private use, and held the entire statute invalid on that ground alone. This conclusion ignored the express provision of the Congress that if the statute should be held invalid as applied to "any person or circumstances * * * the application of such provision to other persons or circumstances shall not be affected thereby." 19 U.S.C. 1652. But beyond that, we submit, whatever freedom individuals might have to import obscene materials for personal use, commercial importers have no standing to assert those rights in behalf of their own, quite different, activities.

It is true that when First Amendment freedoms have been involved, this Court has relaxed to some extent the traditional rule of standing, see, *e.g.*, *United States* v. *Raines*, 362 U.S. 17, 21, and "allowed attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486; *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432–433; *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98. The reason for this relaxed rule of standing is the possible "chilling effect" of such statutes on the exercise of First Amendment rights.

Permitting individuals to attack such a statute, irrespective of its application to their particular activity, is a means of lessening substantially the prospect that persons whose activity is constitutionally protected will refrain from exercising their rights for fear of criminal sanction. See *Thornhill* v. *Alabama,* 310 U.S. 88, 97–98; *Dombrowski* v. *Pfister,* 380 U.S. 479, 486–487. The cases in which this Court has applied this rationale, however, have involved statutes which are vague, as well as overbroad. *Thornhill* v. *Alabama, supra; Dombrowski* v. *Pfister, supra.*[5] And it is the vagueness which causes the "chilling effect" justifying the more permissive approach.

Even if the customs obscenity statute were held to be overbroad, having valid application to commercial importation but being invalid as applied to importa-

[5] *Freedman* v. *Maryland*, 380 U.S. 51, on which the court below relied, may appear to be an exception. But that case held only that any claimant may challenge the *procedures* of a licensing statute granting broad power to seize allegedly obscene material, where the sweeping nature of those procedures, on their face, substantially inhibits the rights of those who may be entitled to First Amendment protection. See 380 U.S. at 56–57; cf. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 683–684. Accordingly, we concede appellee's standing to challenge the *procedures* of Section 1305, whether or not the materials he seeks to import are in fact obscene; he would, indeed, be threatened if the statute involved excessive *procedures*, though we contend that it does not. And appellee would have standing to challenge the application of Section 1305 if it embodied a "vague" standard, as did the cases in the text. But here the *only* contention is overbreadth, that in addition to assumedly proper application to appellee, the statute improperly applies to some others. *Freedman* is no authority for the proposition that appellee has standing to make that limited claim.

tion for personal use, it is not vague. The distinction between intended commercial and personal use is sufficiently clear to remove any uncertainty regarding the reach of the statute if valid only in application to commerce. Similarly, the statute is not unconstitutionally vague in its designation of what materials may not be imported. That issue was settled by *Roth*, where the Court held that the term "obscene" was not impermissibly vague. 354 U.S. at 491–492. The Court then adopted, and has since consistently adhered to, an approach to the obscenity question in which the issue is not the invalidity of statutory provisions on their face, but whether the provisions are invalid as applied. *E.g., Ginzburg* v. *United States*, 383 U.S. 463, 475; *Mishkin* v. *New York*, 383 U.S. 502, 507; *Redrup* v. *New York*, 386 U.S. 767; Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 884–887, 921–922. The statute does not, in short, chill the exercise of First Amendment rights.

There is consequently no reason to permit a commercial importer, whose activity is the "sort of 'hard-core' conduct that would obviously be prohibited under any construction" of the statute, *Dombrowski* v. *Pfister, supra*, 380 U.S. at 491–492, to escape application of the statute to him by challenging the validity of its possible application to a manifestly different situation.[6] It would be improper to strike down the entire

[6] In analogous commercial solicitation cases, this Court has held that it is "not open to the solicitors for gadgets or brushes" to assert the First Amendment claims of non-commercial distributors of pamphlets or magazines. Compare *Breard* v. *Alexandria*, 341 U.S. 622, 641, *Valentine* v. *Chresten-*

statute at the behest of one to whom it validly applies, *Roth* v. *United States, supra,* when any overbreadth can be cured by a restrictive interpretation which will avoid constitutional doubt or by excising invalid portions of the statute. 19 U.S.C. 1652, *supra.* See *Scales* v. *United States,* 367 U.S. 203; *Noto* v. *United States,* 367 U.S. 290; Sedler, *Standing to Assert Jus Tertii in the Supreme Court,* 71 Yale L.J. 599; Note, *supra,* 83 Harv. L. Rev. at 907–910, 918–923. This approach was recently adopted, as to this very statute, by a three-judge district court in the Southern District of New York. *United States* v. *Articles of "Obscene" Merchandise, supra,* 315 F. Supp. at 196–197.[7]

III. THE CUSTOMS STATUTE PROHIBITING THE IMPORTATION OF OBSCENE MATTER PROVIDES ADEQUATE ADMINISTRATIVE AND JUDICIAL SAFEGUARDS FOR THE DETERMINATION OF WHETHER THE IMPORTED MATERIAL IS OBSCENE

Section 1305(a) authorizes administrative detention of material seized at customs for only a short period of time preliminary to a prompt judicial determination of the question whether the material is obscene, and places the burden of seeking that determination

---

sen, 316 U.S. 52, and *Ginzburg* v. *United States,* 383 U.S. 463, 475, with *Martin* v. *Struthers,* 319 U.S. 141. See also Note, *supra,* 83 Harv. L. Rev. at 908–910; *New York State Broadcasters* v. *United States,* 414 F. 2d 990 (C.A. 2), certiorari denied, 396 U.S. 1061.

[7] The court cited *United States* v. *One Carton Positive Motion Picture Film Entitled "491"* 367 F. 2d 889, 898 (C.A. 2) and *United States* v. *A Motion Picture Film Entitled "Pattern of Evil,"* 304 F. Supp. 197 (S.D. N.Y.), as examples of decisions upholding the validity of 19 U.S.C. 1305(a) as applied to commercial importation of obscenity.

on the government. The court below, relying on *Freedman* v. *Maryland,* 380 U.S. 51, held this procedural scheme unconstitutional for failure to establish a "specified brief period" of time limiting the duration of the proceedings (App. 26). We believe, however, that the seizure and forfeiture provisions of the statute are not invalid because Congress did not fix exact time limits. See *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 678–680, 690, n. 22.

In *Freedman,* a state statute required motion picture exhibitors to submit all films to a board of censors for approval prior to exhibition. 380 U.S. at 52, 54. There was no time limit on completion of the reviewing board's action and the burden of initiating judicial review of its decision was on the exhibitor. *Id.* at 55. This Court held this system invalid because it lacked necessary "procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 58. Specifically, it did not place upon the censor the burden of proving that the film is not protected expression; there was no assurance "by statute or authoritative judicial construction, that the censor will, within a specified brief period," either approve the film or go to court to restrain its exhibition; nor was there assurance that any "restraint imposed in advance of a final judicial determination * * * [is] limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution"; and, finally, there was no guarantee of a "prompt final judicial decision." *Id.* at 58–59.

The Court subsequently invalidated a Chicago prior

censorship system because the period fixed for administrative determination of obscenity (50 to 57 days) was excessive and because there was no provision for prompt adjudication by the courts. *Teitel Film Corp.* v. *Cusack,* 390 U.S. 139. By contrast, in *Interstate Circuit* v. *Dallas,* 390 U.S. 676, the Court approved a city ordinance requiring prior classification of motion picture films where the total administrative period, although not entirely fixed, was quite short,[8] and there was provision for speedy judicial resolution of the issue. Similarly, the procedural system in this case affords the safeguards which *Freedman* and its progeny require. The government bears the burden of action and proof throughout, and must secure judicial as well as administrative condemnation of any material it seeks to bar. Both the administrative and judicial periods during which allegedly obscene material is detained are the shortest compatible with sound resolution of the question of obscenity.

The validity of initial detention of questionable material is plainly proper in light of the broad congressional power to regulate the importation of goods from abroad and the numerous regulatory purposes that

[8] The ordinance had a provision that if the classification board was dissatisfied with the exhibitor's proposed classification of the film, the exhibitor was required to project the film before the board at the "earliest time practicable." Thereafter, the ordinance provided for various brief maximum periods within which particular administrative determinations or court actions had to be made. This Court reversed the lower court's issuance of an injunction against showing of the movie in question on the ground that the standards for censorship were unconstitutionally vague.

detention serves. *E.g., United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 898 (C.A. 2); *United States* v. *392 Copies of a Magazine Entitled "Exclusive"*, 253 F. Supp. 485, 490–491 (D. Md.), affirmed, 373 F. 2d 633 (C.A. 4), reversed on other grounds *sub nom. Central Magazine Sales, Ltd.* v. *United States*, 389 U.S. 50. Serious questions would arise, once materials had been permitted past the customs barrier, whether the government's interest had not become moot.

Section 1305(a) provides that "[u]pon the seizure" of an article thought to be obscene, "the collector shall transmit information thereof to the district attorney of the district * * * who shall institute" forfeiture proceedings in the district court. Customs agents who initially seize material are required to report their action "immediately" to the collector, 19 U.S.C. 1602. The United States Attorney, in turn, must cause the proper proceedings to be commenced and prosecuted, "forthwith * * * without delay," 19 U.S.C. 1604.

The legislative history of 19 U.S.C. 1305(a) indicates that Congress intended the judicial determination of obscenity to be prompt. The original 1930 bill made no reference to judicial proceedings, stating only that obscene material "shall be subject to seizure and forfeiture under the customs laws." 72 Cong. Rec. 5414. Fears of administrative censorship expresed in the Senate debate, *id.* at 5417–5423, 5517–5518, led to a proposed amendment requiring judicial proceedings. *Id.* at 5421. The amendment required the customs collector to refer matter seized as obscene "immediately" to the district attorney. *Ibid.* It was understood that this would lead

to a "prompt determination of the matter by a decision of that court." *Id.* at 5424. The proposal met with general approval. *Id.* at 5421–5424. But because the amendment provided for a jury trial, it was rewritten; the word "immediately" was omitted in this revision. *Id.* at 5423–5424. The section was then passed in its present form. *Id.* at 5520. There is no indication in the debate, however, that the omission was intended to alter the purpose of the amendment to require prompt proceedings, and those courts which have considered the legislative history of the statute have agreed. *E.g., United States* v. *One Carton Positive Motion Picture Film Entitled "491"*, 367 F. 2d 889, 899 (C.A. 2); *United States* v. *One Book Entitled "The Adventures of Father Silas,"* 249 F. Supp. 911, 916–918 (S.D.N.Y.). See, also, *United States* v. *392 Copies of a Magazine Entitled "Exclusive", supra. United States* v. *56 Cartons Containing 19,500 Copies of a Magazine Entitled "Hellenic Sun"*, 373 F. 2d 635 (C.A. 4), reversed on other grounds *sub nom. Potomac News Co.* v. *United States,* 389 U.S. 47; *United States* v. *77 Cartons of Magazines,* 300 F. Supp. 851, 853 (N.D. Cal.).

The several decisions which have upheld the procedures of Section 1305(a) in spite of the absence of legislatively fixed periods have placed stringent limits on the permissible length of administrative and judicial proceedings. In *"Hellenic Sun"* 14 days between entry and institution of proceedings, and another 18 days before filing of the opinion (or 27 days until the formal order was entered) were approved. 373 F. 2d

at 637–638. In *"Exclusive"* periods of 14 days between entry and institution of proceedings, and about six weeks prior to decision were sustained (373 F. 2d at 633–634).[9] Periods of 176 days and 209 days, respectively, were approved in *"491"*, but approval rested on the ground that most of the delay was attributable to the importer. 367 F. 2d at 903–904. In *"Father Silas,"* periods of 98 days and 165 days were disapproved. 249 F. Supp. at 914–915. After this decision the Customs Bureau and the Department of Justice adopted new procedures designed to streamline the administrative determination of obscenity. See the *"Exclusive"* case, 253 F. Supp. at 488–489.[10] These judicial and administrative interpretations of Section 1305(a) provide the

[9] The latter period was found reasonable because of the intervention of this Court's decisions in the *Mishkin*, *Ginzburg*, and *Memoirs* cases which necessitated the filing of additional briefs. 253 F. Supp. at 491.

[10] The present Bureau of Customs Circular (RES–15–RM, July 13, 1966) provides that: (1) the first examination of any material which may include obscene material shall be made "as soon as possible" after it is available for customs examination; (2) if the first examining officer determines that further review of the material is necessary at the district level, the material shall be reviewed by the district director or his delegate "no later than the following business day"; (3) if, at any review, the material is determined not to be obscene, it shall be released; (4) if, at any review, the material is determined to be obscene, an assent to forfeiture shall be solicited "forthwith". If assent is not forthcoming "within one week", or if assent is declined, the material shall be referred to the United States Attorney "immediately"; and (5) if it is felt that the material is probably obscene but there is no clear precedent for the determination, the material shall "immediately" be forwarded for review to the Bureau "by the most expeditious means."

requisite assurance of a prompt determination by a court on the issue of obscenity and, for that matter, sufficiently define a "specified brief period." More rigid time limits would, in fact, seem undesirable. As the court noted in the *"491"* case, "specific time limitations on administrative action * * * would serve only to inject inflexibility into the regulatory scheme authorized under Section 305." [11] 367 F. 2d at 899. See, also, *"Father Silas", supra,* 249 F. Supp. at 923.

The promptness with which forfeiture proceedings took place in this case further confirms that the lack of legislatively fixed times creates no constitutional problem.[12] The photographs were seized on October 24,

[11] A flexible period within which to initiate court action serves several legitimate purposes. For example, it allows careful consideration of material which may present a close question of obscenity so that the Customs Service can properly exercise its duty to select material for judicial consideration with due regard for the interests of both the public and the importer. See *"491," supra,* 367 F. 2d at 902. And, at times when the volume of goods entering the country is at a peak, flexibility will insure that obscene material does not pass through customs simply because government officials missed a deadline by a day or two.

[12] An additional example of the speed with which administrative and judicial action takes place under Section 1305(a) is provided by proceedings regarding the film "Quiet Days in Clichy". The movie was seized at customs in Los Angeles on May 2. A complaint for forfeiture was filed on May 19. Relying on its previous decision in this case, *United States* v. *Thirty-Seven Photographs*, 309 F. Supp. 36, the district court ordered the complaint dismissed on May 20. On May 30, Mr. Justice Black stayed that order, on motion of the United States. The United States pointed out then and thereafter that the claimant had not permitted the obscenity of the film to be determined in the forfeiture proceedings, and that it stood

1969 (App. 24). Within thirteen days, on November 6, 1969, the instant forfeiture action was commenced (*ibid.*). Plainly, as appellee conceded below (App. 26), the government instituted the judicial proceeding rapidly and without delay. Another two months elapsed before the three-judge court hearing of the matter on January 9, 1970. But this delay was not chargeable either to the government officials or to the court procedures under Section 1305(a). Rather it was caused primarily by appellee's invocation of the three-judge court machinery. Although appellee was entitled to seek a three-judge court, his choice should not entitle him to argue that the consequent delay renders the statutory procedures invalid as to him. See the *"491"* case, *supra*, 367 F. 2d at 903–904. Finally, the decision was rendered on January 27. A period of two weeks for consideration of the difficult constitutional questions and writing an opinion is hardly excessive. In sum, the three-month period was completely consistent with prompt, yet responsible, administrative and judicial proceedings on the issue of the obscenity of the material seized.

---

ready to proceed on that issue if claimant so desired. On June 29, this Court denied a motion by claimant to vacate the stay, with leave to renew if "a trial on the obscenity *vel non* of this film has not commenced by August 3, 1970, unless any delay of the trial beyond that date has been occasioned by * * * Grove Press." *United States* v. *Ten Reels of a Motion Picture Entitled "Quiet Days in Clichy," Grove Press, Inc., claimant*, 399 U.S. 920. Trial commenced within a week of that order; the film was found not obscene.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the district court should be reversed.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
JOHN F. DIENELT,
Assistant to the Solicitor General.
ROGER A. PAULEY,
ROBERT E. LINDSAY,
Attorneys.

DECEMBER 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970